

\*\*E-Filed 12/4/2009\*\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

OPTIONS NATIONAL FERTILITY REGISTRY,  
a California Corporation; and JESSICA and a class  
of similarly situated persons,

Plaintiffs,

v.

AMERICAN SOCIETY FOR REPRODUCTIVE  
MEDICINE; SOCIETY FOR ASSISTED  
REPRODUCTIVE TECHNOLOGY; DOES 1-102  
(REGISTERED INFERTILITY PHYSICIANS)  
and DOES 103-1500 (FERTILITY CLINICS AND  
ASSOCIATED PROFESSIONAL  
DEFENDANTS),

Defendants.

Case Number C 07-5238 JF (HRL)

**ORDER<sup>1</sup> GRANTING MOTION TO  
DISMISS SECOND AMENDED  
COMPLAINT WITHOUT LEAVE  
TO AMEND; AND DISMISSING  
FEDERAL ACTION WITH  
PREJUDICE**

Plaintiff Options National Fertility Registry (“Options”), and “Jessica,” allegedly representing a class of similarly situated human egg donors, alleges that Defendants American Society for Reproductive Medicine (“ASRM”) and Society for Assisted Reproductive Technology (“SART”) engaged in “egg sharing” as part of an industry-wide practice without the

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<sup>1</sup> This disposition is not designated for publication in the official reports.

1 informed consent of the egg donors. Plaintiffs' initial complaint alleged claims for breach of  
2 contract, tortious interference with a contractual relationship, fraud, and conversion. This Court  
3 dismissed that complaint with leave to amend for lack of subject matter jurisdiction. On January  
4 16, 2009, Plaintiffs filed a first amended complaint ("FAC") alleging the same four state law  
5 claims and adding two federal claims, one for civil RICO violations and one for antitrust  
6 violations. This Court dismissed the FAC with leave to amend on the ground that Plaintiffs had  
7 failed to state a viable federal claim; the Court deferred evaluation of Plaintiffs' state claims  
8 until such time as Plaintiffs allege a viable federal claim. On June 4, 2009, Plaintiffs filed the  
9 operative second amended complaint ("SAC"), alleging the same state and federal claims that  
10 were alleged in the FAC.

11 On August 7, 2009, Defendants moved to dismiss the SAC; a hearing on that motion was  
12 set for September 25, 2009. On August 30, 2009, the Court received notification that Plaintiffs'  
13 counsel had been placed on inactive status by the State Bar of California. On September 3,  
14 2009, the Court received a copy of correspondence in which Teri Royal, president and chief  
15 executive officer of Options, requested that defense counsel agree to an extension of time for  
16 Plaintiffs to respond to the motion to dismiss. On September 8, 2009, the Court issued an order  
17 staying the action to permit Plaintiffs to retain new counsel. The Court reset the motion hearing  
18 for November 20, 2009. There has been no appearance by a new attorney for Plaintiffs, and no  
19 opposition to the motion has been filed. On November 20, 2009, the morning of the hearing, the  
20 Court received an email from Ms. Royal requesting a further continuance of the motion hearing  
21 to permit Plaintiffs a further opportunity to retain new counsel.

22 If Plaintiffs had come close to alleging a viable federal claim, the Court might be  
23 inclined to grant a further continuance so that Plaintiffs could attempt to find new representation  
24 to pursue the action. However, as the Court noted in its order dated May 15, 2009, Plaintiffs'  
25 RICO and antitrust claims are utterly lacking, and indeed appear to be quite farfetched. The  
26 SAC does nothing to cure the defects delineated in the May 15 Order. Accordingly, the Court  
27 will grant Defendants' motion at this time.

28 In assessing whether to grant Plaintiffs yet another opportunity to amend, the Court

1 considers “the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to  
 2 cure deficiencies by previous amendments, undue prejudice to the opposing party[,] and futility  
 3 of the proposed amendment.” *Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir.  
 4 2001) (quoting *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989)); *see*  
 5 *also Foman v. Davis*, 371 U.S. 178, 182 (1962) (providing factors constraining district court’s  
 6 discretion to deny leave to amend). These factors, however, are “not given equal weight . . . ,  
 7 [and] futility of amendment can, by itself, justify the denial of a motion for leave to amend.”  
 8 *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). While there is no evidence of bad faith or  
 9 dilatory motive, the Court concludes that Plaintiffs already have delayed the litigation by  
 10 repeatedly failing to state a viable federal claim and by obtaining a continuance in order to retain  
 11 new counsel and then failing to obtain counsel. It appears to the Court that any attempts to cure  
 12 the defects in Plaintiffs’ federal RICO and antitrust claims would be futile. Accordingly, the  
 13 motion will be granted without leave to amend, and the action will be dismissed with prejudice  
 14 on the ground that Plaintiffs have failed to demonstrate subject matter jurisdiction.

15 This dismissal is without prejudice to Plaintiffs’ assertion of their state law claims in  
 16 state court. This Court has not reached the merits of Plaintiffs’ state law claims and this  
 17 dismissal is not intended as an adjudication on the merits with respect to those claims.

## 18 ORDER

19 For good cause shown,

20 (1) The motion to dismiss is GRANTED WITHOUT LEAVE TO AMEND;

21 (2) The action is DISMISSED WITH PREJUDICE; and

22 (3) The Clerk of the Court shall close the file.

23  
 24 DATED: 12/4/2009

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 26   
 27 JEREMY FOGEL  
 28 United States District Judge

1 Copies of this Order were delivered to:

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3 FROG727@AOL.COM

4  
5 c.lee@mpglaw.com

6 teriroyal@hotmail.com<sup>2</sup>  
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27 <sup>2</sup> Ms. Royal is the president and chief executive officer of Plaintiff Options. Because  
28 Options does not have representation at this time, a copy of this order has been emailed to Ms.  
Royal as a courtesy.